Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. 86-917

In The
Supreme Court of the United States
October Term, 1986

C. F. BEAN CORPORATION,

Petitioner,

versus

DRAGADOS, et al.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH V. FERGUSON, II
234 Loyola Avenue, Suite 302
New Orleans, Louisiana 70112
(504) 522-4747
— and —
MILLER, BOYKO AND BELL
FLETCHER W. PADDISON
550 West "B" Street, Suite 400
San Diego, California 92101
(619) 235-4040
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

33 pp

QUESTION PRESENTED

Do the "special and important reasons" required for the granting of review on writ of certiorari (Rule 17.1) exist where (a) petitioner has not shown any conflict between this decision and the decisions of other courts of appeal or this Court; (b) the collateral estoppel issue raised by petitioner was not raised on the appeal to the Court of Appeals and was merely an alternative ground for the District Court's judgment; (c) petitioner in its brief before the Court of Appeals failed to include any citations to the record and the Court of Appeals found that the appeal was frivolous pursuant to Federal Rules of Appellate Procedure, Rule 38; and (d) there is substantial evidence in support of the District Court's findings and petitioner has failed to demonstrate how the findings were clearly erroneous.

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STATEMENT OF THE CASE

C. F. Bean's Petition states that: "This case presents the question of whether the District Court improperly applied the principle of collateral estoppel to the final decision of a tribunal of the Department of Admiralty of the Government of Mexico." This is the primary issue presented by C. F. Bean Corporation ["Bean"]. How-

ever, this issue was neither *raised nor briefed* before the Court of Appeals.[1] It is raised for the first time in the Petition for Writ of Certiorari. It is so obviously without merit that Bean's former counsel (who was trial counsel) did not see fit to raise the issue on appeal.

Bean is a third party defendant in this action and the only party to dispute the underlying judgment. Bean's petition attempts to raise three issues: (1) the collateral estoppel issue which is raised for the first time; (2) the sanctions imposed for a frivolous appeal; and (3) Bean's attack upon the District Court's findings. The petition is frivolous and should be denied.

Bean's new counsel has presented a distorted statement of the case in support of its petition; purportedly based upon various undisputed findings by the District Court. As in the appeal to the Ninth Circuit Court of Appeals, Bean has failed to present an accurate statement of the facts and the proceedings before the District Court.

A. Statement of Facts.

The complaint in this action was based upon a policy of hull insurance issued by Lloyds of London covering the dredge, the *Russel B. Long*. Bean's predecessor in interest, B. R. Dredging Company, had agreed to sell the *Long* to Dragados for a purchase price of $1.2 million. [Findings Nos. 2 & 3.][2] The dredge was to be towed

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1 Bean's brief to the Court of Appeals is appended hereto.

2 The findings of the District Court are appended to Bean's petition at Appendix C.

to Puerta Madera, Mexico, where the sale, and the transfer of title, to Dragados would be completed.

The District Court found that the value of the *Long* at the time of the purchase contract in April, 1972, was $1.2 million [Findings Nos. 9 & 10], which was the amount of the insurance coverage at the time. [Finding No. 8]. Thereafter, and prior to the tow of the *Long*, Dragados performed various extensive repairs upon the vessel, increasing its value to $1.5 million. Dragados had substantial out-of-pocket expenditures in connection with these repairs. [Findings Nos. 4, 11, 12 & 26.] As a result of the repairs by Dragados, the insured value of the *Long* was increased from $1.2 million to $1.5 million. [Findings Nos. 22 & 23.] B. R. Dredging did not make any expenditures upon the *Long*.

B. R. Dredging's existing policy of fleet insurance did not insure the tow to Puerta Madera, Mexico. [Finding No. 13.] B. R. Dredging and Dragados agreed to jointly obtain insurance to cover their respective interests, increasing the insured value to $1.5 million. B. R. Dredging suggested, and Dragados agreed, that Cal-Surance (the insurance brokers for B. R. Dredging) would obtain a policy on the *Long* increasing the insured value to $1.5 million, extending the policy's navigational limits to Puerta Madera, Mexico, and naming B. R. Dredging, Dragados and ANICO as insureds. [Findings Nos. 17-19.] Pursuant to these discussions, Cal-Surance procured a cover note from Lloyds of London insuring the *Long* for $1.5 million and naming as insureds: "B. R. Dredging, Inc./Dragados, S.A. and American National Ins. Co., as mortgagees." [Findings Nos. 20 & 22.] Dragados paid for this insurance.

At the trial, numerous witnesses testified that the increase in insurance coverage was based upon discussions between B. R. Dredging and Dragados whereupon it was agreed that the insurance coverage would be increased, with the additional $300,000.00 in insurance to cover Dragados's interest. [Findings Nos. 19, 23 & 24.]

During the tow, and prior to the time that title to the dredge passed to Dragados, the dredge sank and was declared a constructive total loss. [Finding No. 27.] Following the loss, Cal-Surance procured *joint* written authorizations from Dragados, B. R. Dredging and ANICO, authorizing Cal-Surance to collect the proceeds from Lloyds for the insureds' account. [Finding No. 31.] Lloyds paid the entire insured value of the *Long* to Cal-Surance. [Findings Nos. 36-38.] Cal-Surance, acting as the agent of the insureds, Dragados, B. R. and ANICO, thereafter disbursed the proceeds *without Dragados's authorization* and without any notice to Dragados. [Findings Nos. 59 & 61-63.]

Unbeknownst to Dragados, B. R. Dredging had demanded that the entire insurance proceeds be made payable to B. R. Dredging and ANICO. Cal-Surance requested, and obtained, an opinion of B. R. Dredging's counsel that it was "right and proper" to make payment solely to B. R. and ANICO, and to the exclusion of Dragados. [Findings Nos. 43-49.] Cal-Surance knew of Dragados's interest, yet did not seek Dragados's authorization or notify Dragados of the disbursement of the funds. [Findings Nos. 42, 61-63.][3]

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[3] The record before the District Court showed that ANICO, following the loss, never claimed or asserted any interest in the

(Continued on following page)

B. Statement of Proceedings on Dragados's Complaint.

In October, 1977, Dragados filed this action against Cal-Surance Overseas Agency, Inc., Cal-Surance Associates, Inc., and Donald A. Martin, alleging breach of agency, breach of fiduciary duty, conversion and negligence. Cal-Surance filed a third party complaint against B. R. Dredging and ANICO as well as against J. Manson Murray, Esq. At the trial of the matter, Bean (B. R. Dredging's successor) and ANICO were *both* represented by the *same* counsel.

A bench trial was conducted before The Honorable Mariana R. Pfaelzer commencing March 2, 1982, and ending on March 17, 1982, with 12 witnesses, several depositions, and more than 600 exhibits being introduced at trial. On November 1, 1982, the District Court rendered its decision holding that Cal-Surance was liable to Dragados for damages in the amount of $298,043.80, plus interest. The District Court also held in favor of Cal-Surance on the third party complaint against Bean and Murray. After further briefing on several subsidiary issues (issues primarily between the defendants and third party defendants), the District Court entered the Judgment and its Finding of Fact and Conclusions of Law in March, 1985. Bean appealed.[4]

(Continued from previous page)

increased amount of insurance coverage. Upon payment of the insurance proceeds, ANICO received $750,000.00. The remaining amounts were retained by B. R. Dredging.

[4] The sole ground asserted upon appeal was that the court's findings concerning the intent of the parties was not supported

(Continued on following page)

The United States Court of Appeals for the Ninth Circuit affirmed the judgment.

C. Statement of Proceedings on Bean's Counterclaim.

Bean filed a counterclaim against Dragados, which was severed for separate trial pursuant to Federal Rules of Civil Procedure, Rule 42(b). The primary issue raised by the petition for certiorari is based upon the counterclaim.

Bean, following the loss of the *Long*, was held responsible for the wreck removal costs imposed by the State of Mexico. In its counterclaim, Bean argued that Dragados's assertion of an insurable interest in the vessel made it liable for a portion of the removal costs under the theory of equitable indemnity. In order to prevail upon its counterclaim Bean had to prove that Dragados was jointly liable for the removal costs.

The District Court ruled that under Mexican law liability for removal costs was imposed solely upon the owner of the vessel. The court, pursuant to Rule 44.1 of the Federal Rules of Civil Procedure, made its own independent determination of the provisions of Mexican law. Thus, the court found that: "Under Mexican law, liability for wreck costs is imposed only upon the shipowner." [Bean's Petition A-39, Finding No. 8, Conclusion No. 2.] As an *alternative* ground, the court found that Bean was collaterally estopped from attacking the proceedings before the First

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(Continued from previous page)

by the record. [See Appendix B.] The Ninth Circuit held that there was substantial evidence supporting the district court's findings and held that Bean's appeal was frivolous.

Collegiate Court of Administrative Cases [Conclusion No. 3].[5]

Thus, the court held that under Mexican law only the shipowner was liable for removal costs; and that Dragados was not the owner and had no liability for such removal costs. This was an entirely separate issue from Dragados's insurable interest in the vessel, and the assertion of an insurable interest (which is separate and apart from ownership) did not subject Dragados to any liability for the removal costs. Accordingly, the court found that there was no joint liability which would call for the application of the principles of equitable indemnity. The court entered summary judgment for Dragados upon Bean's counterclaim.

Bean appealed from this separate judgment in Appeal No. 85-6086. This appeal was consolidated with the appeal on the primary action. On appeal, Bean failed to raise any issues on the order of summary judgment. As noted by the Court of Appeals: "Bean raises no issues on its appeal in No. 85-6086." [Appendix A-3.] None of the District Court proceedings were placed before the Court of Appeals. Bean, in its record, failed to include the judgment, the order of summary judgment, its notice of appeal in Appeal No. 85-6086, the court's Findings of Fact and Conclusions of Law, or any of the briefs or other materials presented to the District Court in support of, or in opposition to, the motion for summary judgment.

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[5] In other proceedings before the United States Fifth Circuit Court of Appeals, Bean had affirmatively alleged (and proven) that B. R. Dredging [Bean] was the owner of the *Long* at the time of the loss. [Bean's Petition A-39, Finding No. 9.] The court held that Bean's assertion of this fact in other litigation was binding upon Bean.

REASONS FOR DENYING THE WRIT

A review on the writ of certiorari "is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore." Supreme Court Rule 17.1. Petitioner, C .F. Bean Corporation, has failed to set forth any grounds for a review of this matter on writ of certiorari.

The judgment of the District Court was based upon a breach of fiduciary duty by defendant Cal-Surance, whereby various monies which were owed to Dragados were paid to Bean who was required to disgorge this windfall through the judgment of the District Court. The Findings of Fact and Conclusions of Law by the court were extremely thoughtful and well prepared. The Ninth Circuit Court of Appeals concurred, not only affirming the judgment, but finding Bean's appeal to be frivolous.

Bean's petition for certiorari fails to show any "special and important reasons" as stated in Rule 17 of the Rules of the Supreme Court of the United States. Indeed, the primary issue which is now urged by Bean was not even raised before the Court of Appeals.

The judgment of the Court of Appeals is not in conflict with the decision of another Court of Appeals on the same matter. Rule 17.1(a). Nowhere does the petition demonstrate that any legal standard, or analysis, employed by the decision conflicts with the standards employed by other circuit courts or this Court. Indeed, the primary issue raised by the petition, *i.e.*, the issue of "collateral estoppel," was not the primary basis but was the alternative basis for the District Court's ruling. Neither basis was raised before the Court of Appeals on appeal.

Nor does petitioner demonstrate how the decision departs from the accepted and usual course of judicial proceedings so as to call for an exercise of the Supreme Court's power of supervision. The District Court judgment was based on a careful review of the evidence and is supported by a comprehensive series of findings and conclusions. The Court of Appeals ruled that substantial evidence supported the rulings.

Finally, petitioner does not identify any important question of federal law which has not been, but should be, settled by the Court. The petition does not identify how the opinion below will affect federal jurisprudence in any respect at all. Rule 17.1(c). Indeed, the decision revolves upon the general principles of jurisprudence and the interpretation of contracts. The central issue presented by the underlying District Court judgment was the responsibility of Cal-Surance to follow the instructions of its principal and to account for monies collected on behalf of its principal. These rulings call for the application of well established rules of jurisprudence, which are largely based upon state—not federal—law.

Based upon the foregoing, it is evident that the Petition for Writ of Certiorari should be denied. No special or important reasons for granting certiorari have been demonstrated by Bean.

ARGUMENT

I. PETITIONER FAILED TO ASSERT THE ISSUE OF COLLATERAL ESTOPPEL BEFORE THE NINTH CIRCUIT COURT OF APPEALS

The first question presented by petitioner for review is whether the District Court improperly applied the principle of collateral estoppel against C. F. Bean.[6]

This issue was not raised before the Court of Appeals. The judgment on Bean's counterclaim was raised in Appeal No. 85-6086. As the Court of Appeals noted in its Memorandum, "Bean raises no issues on its appeal in No. 85-6086." [Appendix A-3.] No issues concerning the summary judgment were raised in any of the proceedings before the Court of Appeals. Accordingly, the issue of collateral estoppel is now asserted *for the first time* in this petition for writ of certiorari. Obviously, Bean abandoned this appeal and has *waived* this issue.

This Court has frequently held that issues not raised before the Court of Appeals will not be addressed by the Supreme Court absent extraordinary circumstances. Thus, in *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. —, 106 S.Ct. 1678, 1681, 90 L.Ed.2d 19, 24 (1986), the Court refused to consider issues which had not been raised before the Court of Appeals:

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[6] In fact, petitioner misstates the District Court's ruling. The District Court made a determination of Mexican law pursuant to Federal Rules of Civil Procedure, Rule 44.1. Alternatively, it applied the rule of collateral estoppel as a basis for holding that Dragados was not liable for the removal costs incurred by the State of Mexico.

> Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals. [Citations omitted.]

See also, G. D. Searle & Co. v. Cohn, 455 U.S. 404, 412 n. 7, 102 S.Ct. 1137, 1143, 71 L.Ed.2d 250, 258 (1982); *Rogers v. Lodge,* 458 U.S. 613, 628 n. 10, 102 S.Ct. 3272, 3281, 73 L.Ed.2d 1012, 1025 (1982) ["This contention was not properly raised in the Court of Appeals and was not addressed by that court. We therefore do not address it."]; *Delta Airlines, Inc. v. August,* 450 U.S. 346, 362, 101 S.Ct. 1146, 1155, 67 L.Ed.2d 287, 298 (1981) ["Although defendant's petition for certiorari presented the question of the district judge's abuse of discretion . . . that question was not raised in the Court of Appeal and is not properly before us."].

The first time this issue has been raised is in the petition for writ of certiorari. Even there, Bean has failed to include any record of the proceedings before the District Court on the granting of the order and the Court should properly refuse to consider the issue.

II. THE COURT CORRECTLY RULED ON THE COUNTERCLAIM

In Dragados's complaint against Cal-Surance, the issue was whether Cal-Surance, as the agent for Dragados, breached its duties in distributing insurance proceeds without the authorization of Dragados. The court found that Cal-Surance did breach its duties. The court then went on to find that Dragados performed extensive repairs to the *Long* which increased its value to $1.5 million, and that B. R. Dredging and Dragados had agreed that the insurance

coverage on the *Long* would be increased in order to protect the interests of Dragados.

Bean makes the entirely specious argument that any entity which had an insurable interest in the vessel would be liable for the removal costs of the vessel. This is a misstatement of the record before the court and a complete misstatement of the law.

The Supreme Court long ago decided that an interest in insurance proceeds is separate and apart from an interest in the property itself. *Place v. Norwich & New York Transportation Co.*, 118 U.S. 468, 6 S.Ct. 1150 (1886). An insurable interest in a vessel has *nothing* to do with the liability for the removal costs. Under Mexican law, liability for removal costs is imposed *solely* upon the shipowner.[7]

Liability for wreck removal costs is not imposed under Mexican law upon an individual merely because they have an insurable interest in the vessel. Thus, by way of example, ANICO had no liability for wreck removal costs, although it had a clear insurable interest in the *Long*.

Dragados had an insurable interest in the *Long*. Its interest was based upon the repairs to be conducted by Dragados, Dragados's expectation of profit from the dredging operations to be conducted with the dredge pursuant to a contract with the State of Mexico, and Dragados's interest as the purchaser under the Contract of Sale. [Findings Nos. 4, 6, 11 & 12.] Each of these is a well recognized basis for an insurable interest.

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[7] Insurance coverage for this type of liability is customarily carried by the owner under a Protection and Indemnity Policy.

The District Court made its determination of Mexican law under Federal Rules of Civil Procedure, Rule 44.1.[8] This was also the holding of the Mexican courts and, *alternatively,* the District Court held that Bean [B. R.] was collaterally estopped from contesting this issue.

Bean's counterclaim was completely without merit. Bean alleged that Dragados (because it held an insurable interest) was jointly liable for the wreck removal costs under Mexican law and Bean was entitled to equitable indemnity for these costs. The court ruled that under Mexican law Dragados was not liable for the wreck removal costs; liability was imposed only upon the shipowner—B. R. Dredging. Dragados's insurable interest did not make it liable for these costs. Inasmuch as there was no joint liability, there was no basis for the application of the principles of equitable indemnity. Accordingly, the court entered summary judgment in favor of Dragados and against Bean.

Petitioner has failed to show how this issue merits consideration. Petitioner has failed to demonstrate how the decision conflicts with any decision of another court of appeals or this Court. This issue does not present an issue under federal law which requires resolution by the Supreme Court. Bean's position lacked any merit before the District Court, was not even raised before the Court of Appeals, and does not merit review by the Supreme Court.

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[8] Significantly, Bean presented no contrary evidence to the District Court on the provisions of Mexican law although Bean had more than three years to prepare its opposition to the motion for summary judgment.

III. SANCTIONS IMPOSED BY THE COURT OF APPEALS FOR A FRIVOLOUS APPEAL WERE NECESSARY AND PROPER

The Court of Appeals properly imposed sanctions upon C. F. Bean for the filing of a frivolous appeal. Bean, having delayed these proceedings for several years, now complains that it should not be held liable for its tactics.

Bean's appeal attacked one of the District Court's findings. The brief did not raise any issue, or include any record of the proceedings before the District Court, on the order of summary judgment. Obviously, the appeal filed from that judgment was frivolous.

Secondly, on the issues that were raised by Bean in its appeal, Bean *made no attempt* to review any of the records or proceedings before the District Court. Extensive findings were entered, based upon a voluminous record incorporating more than 600 exhibits. Although Bean attempted to attack the court's findings, no citations to the record or to the testimony or exhibits were stated in Bean's appeal. Dragados, because of Bean's failure to cite the record, was required to review and research the record before the District Court.

Based upon this record, the Court of Appeals held that: "Substantial evidence existed to support the District Court's findings." [Memorandum Opinion, A-2.] The Court of Appeals then noted that: "Bean makes no serious attempt to point to evidence in the record, or lack thereof, that would undermine the District Court's findings." [Memorandum Opinion, A-3.] Bean's appeal was frivolous. The Ninth Circuit properly imposed sanctions upon Bean pursuant to Federal Rules of Appellate Pro-

cedure, Rule 38, which provides that: "If a Court of Appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." Petitioner fails to show how this conflicts with the decisions of other courts of appeal or with this Court. Indeed, Rule 49.2 of the Rules of the Supreme Court of the United States provides that: "When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages." Petitioner fails to show any special reasons meriting review of this issue.

IV. BEAN HAS FAILED TO SHOW THAT THE DISTRICT COURT'S FINDINGS WERE CLEARLY ERRONEOUS

Bean's final basis for its petition for writ of certiorari argues that the Court of Appeals "misunderstood the lack of record citations in the original appeal" and did not comprehend the nature of Bean's appeal. The Ninth Circuit Court of Appeals fully comprehended Bean's appeal, and the issues presented in the appeal, and found them to be frivolous.

The issue in the primary action dealt with the payment of insurance proceeds on the Lloyds policy which had been distributed to Cal-Surance. The proceeds payable upon the loss of the *Long* were in the amount of $1.5 million. It was understood, in connection with the issuance of the policy, that $300,000 of the insurance coverage was issued to protect the interests of Dragados. The court held that it was the clear intent of the parties to the contract of insurance to have $1.2 million of the insurance coverage protect the interests of B. R. [Bean] and ANICO, with the remaining coverage to protect Dragados's interest. An

extensive record existed to support these findings and this record was presented *in detail* to the Court of Appeals. Based upon this record, the appellate court found that: "Substantial evidence existed to support the District Court's findings."

Bean was required to show how these findings are clearly erroneous. (Federal Rule of Civil Procedure, Rule 52.) Bean, in attempting to attack these findings, makes no use of the record and incorporates no citations. Instead, Bean attempts to rely upon the specious argument that ANICO never participated in the issuance of the Cover Note and its intent was not established. Through such sophistry, Bean sidesteps the issues before the District Court while it presents a distorted argument to this Court. As the Court of Appeals noted:

> ANICO's intent is irrelevant. ANICO did not participate or otherwise involve itself in the purchase of the tow insurance policy. Under the mortgage contract, B. R. Dredging was obligated to purchase and maintain fleet insurance and list ANICO as a named insured. As long as ANICO's interest in the collateral was protected, which it was throughout this transaction, ANICO would not be concerned with an increased liability coverage designed to protect the interest of a third party. [Memorandum Opinion, A-2.]

This is an issue of contract interpretation. The District Court made detailed and well supported findings. Petitioner has failed to show how these are clearly erroneous. Both Bean and ANICO were represented by the same counsel in these proceedings; ANICO was fully paid all of the money in which it claimed an interest; *and ANICO failed to appeal from this judgment.* Bean has no standing to raise an issue which, at best, deals with a disinterested third party.

Most significantly, petitioner fails to show how the decision raises a significant issue of federal law or conflicts with other decisions. It is evident this is not a proper case for review by this Court and the petition should be summarily denied.

V. SANCTIONS SHOULD BE IMPOSED FOR THE FILING OF A FRIVOLOUS WRIT OF CERTIORARI

As noted, Rule 49.2 of the Rules of the Supreme Court of the United States provides for the imposition of sanctions for the filing of a frivolous petition for writ of certiorari. Sanctions are appropriate and necessary in order to regulate the proceedings before this Court. It is clear that this Petition is frivolous and was imposed solely for purposes of delay.

For these reasons, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

MILLER, BOYKO AND BELL
FLETCHER W. PADDISON

— and —

JOSEPH V. FERGUSON, II

Counsel for Respondent
Dragados, S.A.

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAGADOS, S. A.,	)	Filed Aug 19 1986
Plaintiff-Appellee,	)	NOS. 85-5840 85-5860 85-5890
vs.	)	85-6086
CAL-SURANCE ASSOCIATION, INC., et al.,	)	DC# CV 77-4081-MRP
Defendants/Third-Party Plaintiff/Appellees,	)	MEMORANDUM*
vs.	)	
C. F. BEAN CORPORATION,	)	
Third-Party Defendant/ Appellant.	)	

Appeal from the United States District Court
for the Central District of California

Honorable Mariana R. Pfaelzer, District Judge, Presiding
Argued and Submitted June 5, 1986

Before: GOODWIN, TANK and FLETCHER, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Third-Party Defendant, C. F. Bean Corp. (Bean) appeals the judgment of the district court holding that Dragados is entitled to a portion of the insurance proceeds which Cal-Surance improperly paid to B. R. Dredging[1] and American National Insurance Company (ANICO). We affirm.

Substantial evidence existed to support the district court's findings. Dragados had agreed to purchase the dredge "Russell E. Long" (Long) from B. R. Dredging. The parties purchased an insurance policy to cover the Long's journey from seller to buyer. Dragados, B. R. Dredging and ANICO (B. R. Dredging's mortgagee) were named as the insureds in the contract.

In the absence of a showing of a party's intent regarding the distribution of proceeds to the named payees, "the loss-payable clause of the policy may be construed as requiring a division in proportion to the respective insurable interest . . . . " *Walsh v. Tadlock,* 104 F.2d 131, 132 (9th Cir.), *cert. denied,* 308 U.S. 584 (1939). The district court's finding that Dragados and B. R. Dredging agreed to obtain tow insurance and further agreed that the $1.5 million coverage, a $300,000 increase over existing coverage, would protect Dragados' repair work investment in the Long is not clearly erroneous.

ANICO's intent is irrelevant. ANICO did not participate or otherwise involve itself in the purchase of the tow insurance policy. Under the mortgage contract, B. R. Dredging was obligated to purchase and maintain fleet in-

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[1] Appellant C. F. Bean Corp. is a successor-in-interest to B. R. Dredging.

surance and list ANICO as a named insured. As long as ANICO's interest in the collateral was protected, which it was throughout this transaction, ANICO would not be concerned with an increased liability coverage designed to protect interest of a third party.

We find this appeal frivolous. Bean makes no serious attempt to point to evidence in the record, or lack thereof, that would undermine the district court's findings. *See DeWitt v. Western Pacific Railroad Co.*, 719 F.2d 1448, 1451 (9th Cir. 1983). Further, Bean raises no issues on its appeal in No. 85-6086. We therefore award single costs and fees to all parties whose presence was necessitated by this appeal.

AFFIRMED.

APPENDIX B

No. 85-5840

(Consolidated with Nos. 85-5860, 85-5890, and 85-6086)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAGADOS, S.A.,

Plaintiff/Appellee,

VS.

CAL-SURANCE ASSOCIATES, INC., etc., et al.,

Defendants/Appellees/Cross-Appellants.

CAL-SURANCE ASSOCIATES, INC., etc., et al.,

Defendants/Third-Party-Plaintiffs/Appellees/Cross-Appellants,

VS.

VICKERS, RIIS, MURRAY & CURRAN,
a partnership, et al.,

Third-Party Defendants/Appellants

Appeal from the United States District Court
for the Central District of California

The Honorable Marianna R. Pfaelzer, Judge

APPELLANT'S OPENING BRIEF

PRELIMINARY STATEMENT

This appeal arises out of the competing claims by three named insureds to $300,000 worth of $1,500,000 in insurance proceeds resulting from the sinking of a dredge. The District Court awarded the disputed portion of the proceeds to the named-insured plaintiff below on the sole basis that the three named insureds had agreed that the $300,000 would be paid to plaintiff. This appeal is based upon the fact that the District Court's findings on the pivotal issue of agreement by one of the three claimants are not supported by *any evidence*. Indeed, at final argument, the District Court acknowledged that:

> "There isn't a shred of evidence anywhere in this trial that [the named insured claimant] ever agreed to anything."

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STATEMENT OF THE CASE[1]

A Mexican dredging company ("Dragados", plaintiff below, appellee here) entered into a written contract for the purchase of a dredge (the "*Long*") from an American dredging company ("BR/Bean", earlier called B. R. Dredging; third party defendant, appellant here). The purchase price was $1,200,000 and Dragados paid $80,000 down. Prior to the time Dragados and BR/Bean entered into the contract and at all times thereafter up to the sinking, the *Long* was subject to a first preferred ship mortgage (called a "fleet mortgage") given by BR/Bean

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[1] Digested from those findings which are not disputed here

to American National Insurance Company ("ANICO", third party defendant, not appellant here). The mortgage covered several of BR/Bean's vessels, was used as the basis of an ongoing line of credit between BR/Bean and ANICO and required BR/Bean to maintain insurance on the fleet, with ANICO as a named insured.

The contract of sale contemplated that the *Long* would first be towed from the last place of use by BR/Bean across the high seas to the place where Dragados intended to use it. It also provided that title would not pass from BR/Bean to Dragados until the trip was complete. Prior to the tow, Dragados and BR/Bean (but not ANICO) agreed to obtain a policy of insurance for $1,500,000 to cover the *Long* during the tow and to list Dragados, BR/Bean *and* ANICO as named insured "as their interests may appear." It is the proceeds of this policy which are in dispute here.

After the *Long* was lost, Dragados cancelled the contract of sale and, in proceedings commenced by the Mexican government to determine who was to be responsible for the costs of removing the wreck, denied any ownership interest in the *Long*.

The underwriters paid the full policy amount $1,500,000 less a small retention) to Cal-Surance (defendant and third-party plaintiff), the broker which had originally obtained the policy. After receiving a letter from BR/Bean's attorney asserting on behalf of BR/Bean *and* ANICO a claim to the entire $1,500,000 proceeds, Cal-Surance ultimately decided to disburse the entire proceeds to ANICO which, in turn, directed Cal-Surance to pay approximately one-half of the proceeds to BR/Bean as part of their ongoing line of credit.

Dragados later discovered that Cal-Surance had disbursed the proceeds and filed its Complaint below. Cal-Surance, in turn, brought a third-party complaint seeking indemnity from BR/Bean, ANICO and also from the attorney for BR/Bean who had authored the letter claiming entitlement by BR/Bean and ANICO to 100% of the proceeds ("Vickers/Murray," third-party defendant). Vickers/Murray, in turn, filed its third-party cofplaint seeking indemnity from Dragados, BR/ Bean and ANICO.

After trial, the District Court entered judgment in favor of Dragados and against Cal-Surance on the underlying Complaint. It then entered judgment for indemnity in favor of Cal-Surance and against BR/Bean and Vickers/Murray (but not against ANICO) and, again in turn, entered judgment for indemnity in favor of Vickers/Murray and against BR/Bean (but not ANICO). Therefore, the full weight of the District Court's decision that the three named insureds agreed that Dragados was to receive $300,000 of the $1,500,000 proceeds has fallen upon BR/Bean and includes: $298,343.80 in principle, and $380,593.39 in prejudgment interest, as well as the attorneys' fees of Cal-Surance.

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ISSUE PRESENTED

But for the District Court's finding that all three named-insureds had agreed that Dragados would receive a $300,000 share of the proceeds, Dragados would not have recovered on its underlying Complaint. Therefore, if those findings are not supported by substantial evidence, the underlying judgment must fall and, with it, the judgments of indemnity.

The narrow issue, therefore, is whether the District Court's finding that ANICO agreed that Dragados was to receive $300,000 of the proceeds (Findings No. 23 and 24) were supported by substantial evidence. *ASARCO, Inc. v. Occupational and Health Administration*, 746 F.2d 483, 490 (9th Cir. 1984) [citing *American Textile Manufacturers Institute v. Donovan*, 425 U.S. 490, 522, 101 S.Ct. 2478, 2497, 69 L.Ed. 2d 185, 210 (1981)].

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ARGUMENT

As mortgagee, ANICO was one of the three named insureds on the subject insurance policy. In Finding No. 23, the District Court concludes that, "The intent of the insureds . . . was that . . . $300,000 covered the interest of Dragados. . . ." There was no testimonial or documentary evidence (of *any* sort) received from ANICO's personnel or files. Indeed, there was no testimonial or documentary evidence received from Dragados (or the remaining parties) regarding any alleged agreement by ANICO.

Faced with this total lack of evidence regarding ANICO's intent or agreement, Dragados presented to the District Court, three years after closing argument, Finding No. 24 which attempts to shift Dragados' burden of proof on the issue of ANICO's alleged agreement. Dragados made this belated attempt to provide evidence where there was none by having the District Court base its finding of ANICO's intent on the *absence* of credible evidence of what ANICO intended (Finding No. 24(a) and (d)). Dragados' burden of demonstrating the existence of an

agreement cannot be met with the *absence* of evidence. If Dragados does not make its prima facie case-in-chief, no rebuttal evidence is necessary.

Finally, the District Court made its analysis of the case exquisitely clear when, at closing argument following eight days of trial,[2] it stated:

> "And if the mortgagee [ANICO] hadn't agreed, then Dragados doesn't get anything."

and

> "There isn't a shred of evidence anywhere in this trial that ANICO ever agreed to anything."

and

> "I don't think you can inpute anything to ANICO on this record."
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> Reporter's Transcript for March 17, 1982, p. 1084, lines 8 and 9, p. 1117, lines 18 and 19, and p. 1143, lines 15 and 16.

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CONCLUSION

Because the question of agreement by Dragados and BR/Bean *and* ANICO as to distribution of the insurance proceeds is the linchpin supporting the District Court's judgment, and because that linchpin must fail for lack of *any* evidence that ANICO ever agreed to or intended anything, the judgments must be reversed and the case re-

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[2] Presumably, the District Court's understanding of the state of the evidence was more complete at this juncture than it was three years later when it signed the findings.

manded to the District Court for a new trial of Dragados' claims against Cal-Surance and, of third-party indemnity claims against BR/Bean. (No appeal having been taken from the judgment dismissing all claims against ANICO, that judgment is now final. Obviously, ANICO can be compelled to provide evidence of its understanding, intention and agreement, if any, as a non-party witness). At the re-trial, presumably BR/Bean will argue that Dragados was fully aware of ANICO's position as holder of the first preferred fleet mortgage (see Finding No. 16 here) and that interpretation of the phrase "as their interests may appear" should be guided by the following language:

> "The words 'as their interest may appear' in insurance policies has been before the courts repeatedly. They refer to debts owed by the insured. When a mortgagee is so designated, the clause, usually referred to as 'the open mortgage clause' means that the insurer will pay the mortgage 'to the extent of his lien or charge upon the premises at the time of the loss.'" *Eagle Star & British Dominions v. Tadlock,* 22 F. Supp. 545, 547 (1938).

Respectfully submitted,

MUSICK, PEELER & GARRETT

By JAMES B. BERTERO
Attorneys for Appellant